NO. 79-1794

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

PEOPLE OF THE STATE OF
MICHIGAN, Petitioner

V.

GEORGE SUMMERS, Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MICHIGAN

MOTION OF JOHN B. HOLMES, JR. AS DISTRICT ATTORNEY OF HARRIS COUNTY, TEXAS, AND AMERICAN LEGAL FOUNDATION, FOR LEAVE TO FILE AMICUS CURIAE BRIEF

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AMICUS CURIAE BRIEF, OF JOHN B. HOLMES, JR., AS DISTRICT ATTORNEY OF HARRIS COUNTY TEXAS, AND AMERICAN LEGAL FOUNDATION, URGING REVERSAL

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John B. Holmes, as District Attorney of Harris County, Texas, and American Legal Foundation, movants, hereby respectfully request leave to file a brief amicus curiae urging reversal of the judgment of the Supreme Court of Michigan. The interest of Amici is set forth in a section entitled

"Interest of Amici Curiae" in the brief annexed hereto, which section is adopted in this motion as though set out at this point.

District Attorney John B. Holmes is the authorized law officer of a political subdivision of Texas and files this brief under authority of Rule 36.4 of the Rules of this court, under which consent is not required. American Legal Foundation has sought consent. Such consent has been orally given by the State of Michigan, though no written consent has been received. Counsel for the accused did not state whether he would consent when first contacted, and amici have been unable to contact him further; accordingly, these amici have filed this motion.

An amicus curiae brief is desirable because this case presents the issue whether reasonable, good faith conduct of law enforcement officers should result in

exclusion of evidence whose seizure is subsequently adjudicated unlawful. The diverse policy arguments underlying the exclusionary rule, the complex history of its adjudication and the alternative bases for disposition presented in this case are reasons for believing that this important issue may not be completely developed without amicus participation. Amici have continuing experience with and interest in this issue and may be able to aid the Court in developing the case fully.

Respectfully submitted,

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TABLE OF AUTHORITIES

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INTEREST OF AMICUS CURIAE

John B. Holmes is District Attorney of Harris County (Houston), Texas. He has responsibility for the prosecution of crimes within his jurisdiction.

American Legal Foundation ("ALF") is a nonprofit corporation acting as a public interest law firm. Among other goals, it seeks the preservation of a rational criminal justice system. In connection with this last objective, ALF is interested in limitation of the exclusionary rule

to situations in which the purposes of that rule are served.

It is the position of Amici Curiae that the search and seizure at issue in this case was lawful. Amici adopt the position of the State of Michigan in this respect. This brief addresses only the possibility that this Court might consider that the seizure in question was improper or erroneous. In that event, Amici would urge the court that evidence obtained through a good faith, reasonable error should not be excluded.

SUMMARY OF ARGUMENT

In the event that this court should decide that the seizure at issue was erroneous or unlawful, Amici would urge the court to adopt the analysis followed by the Fifth Circuit in United States v. Williams,

622 F.2d 830 (5th Cir. 1980) (en banc). In Williams, the Fifth Circuit recognized an exception to the exclusionary rule in the event of a "reasonable good-faith mistake" or a "technical violation."

The main premise underlying the exclusionary rule is that the rule deters illegal police conduct. In Williams, however, the Fifth Circuit correctly concluded that when an officer acts in the good-faith belief that his conduct is constitutional, and when he has a reasonable, articulated basis for that belief, the exclusionary rule cannot operate to deter his conduct. The standard adopted in Williams requires both a showing of honesty ("good faith") and an objective proof of articulated reasons for believing the search lawful ("reasonableness"), so that neither bad faith nor ignorance will be rewarded and the deterrence premise is fully served.

A second premise underlying the exclusionary rule is that a court should avoid the "taint" of illegally obtained evidence. This premise, however, does not mandate the exclusion of evidence seized reasonably and in good faith. To the contrary, the criminal process is tainted by the exclusion of such evidence, since it creates a public perception that meaningless technicalities control the law, demoralizes conscientious police officers, produces unnecessarily haphazard results, suggests to accused persons that innocence is irrelevant and forces courts into shifting and inconsistent positions. Thus both the "deterrence" rationale and the "taint" rationale support the adoption of a position such as adopted in Williams.

ARGUMENT AND AUTHORITIES

This brief adopts the position of petitioner State of Michigan that the seizure here in question was lawful. This factual situation is different from those in Dunaway v. New York and Ybarra v. Illinois, 444 U.S. 85 (1979). In the event, however, that this Court does not accept Michigan's position on these issues, it is respectfully submitted that the following analysis should be adopted.

I. IN WILLIAMS V. UNITED STATES, 622 F.2D 830 (5TH CIR. 1980), (EN BANC), THE FIFTH CIRCUIT RECOGNIZED "REASONABLE, GOOD-FAITH MISTAKE" AND "TECHNICAL VIOLATION" EXCEPTIONS TO THE EXCLUSIONARY RULE. THE WILLIAMS POSITION IS WELL REASONED AND SHOULD BE ADOPTED BY THIS COURT.

The holding of a majority of the Fifth Circuit in United States v. Williams was as follows:

> "Sitting en banc, we now hold that evidence is not to be suppressed under the exclusionary rule when it is discovered by officers in the

> course of actions that are taken in good faith and in the reasonable, though mistaken, belief that they are authorized."

622 F.2d at 840. The Williams approach encompasses two situations. One is the reasonable, good-faith mistake, in which the officer makes a judgmental error concerning the existence of facts sufficent to authorize seizure, and he has reasonable and articulable basis for a belief in the lawfulness of his conduct. The other is the "technical violation." In this situation, the officer relies on a warrant that contains a typographical error, a statute that is later invalidated or a Supreme Court or other appellate decision that is later changed.

The Williams rule is carefully calibrated to serve the purposes of the exclusionary principle to the fullest. It requires, first, that the judgmental error be an honest one--that is, that it be in "good faith."

Secondly, it requires that the judgment be "objectively reasonable," so that ignorance or sloppiness will not be rewarded. The Fifth Circuit stated this latter requirement thus:

> "We emphasize that the belief, in addition to being held in subjective good faith, must be grounded in objective reasonableness. It must therefore be based on articulable premises sufficient to cause a reasonable, and reasonably trained, officer to believe that he was acting lawfully. Thus a series of broadcast breakins and searches carried out by a constable--no matter how pure in heart--who had never heard of the fourth amendment could never qualify."

622 F.2d at 841 n.4a. The burden is on the Government to prove these elements.

The Williams opinion states, "The Supreme Court and this circuit have all but explicitly adopted the technical violation exception facet of the good-faith exception, and each has rendered several decisions that implicitly, at least, support the good-faith mistake facet . . . ." 622 F.2d at 841. It

is submitted that the Williams rule is fully consistent with this Court's decisions. The Williams opinion carefully analyzes relevant Supreme Court authority to prove this point, and that analysis of those decisions is adopted by this brief.

II. THE EXCLUSIONARY RULE SHOULD NOT BE APPLIED WHEN THE PURPOSE OF DETERRRING ILLEGAL POLICE CONDUCT WILL NOT BE SERVED.

The exclusionary rule is not a requirement of the Constitution. Rather, it is motivated by the thought behind Justice Clark's famous dictum that "There is no war between the Constitution and common sense," and by the need for a mechanism to enforce the fourth amendment. Mapp v. Ohio, 367 U.S. 643 (1961). Since common sense was thus invoked to create the exclusionary rule, common sense should not be disregarded by extension of the doctrine beyond its purposes.

Such an extension would occur unless a reasonable, good-faith mistake exception

were recognized. As this Court stated in Michigan v. Tucker, 417 U.S. 433, 477 (1974),

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."

The Williams approach avoids upholding "willful" misconduct by its good faith requirement. It avoids upholding even "negligent" blunders by requiring objective reasonableness. It is submitted that the Williams approach thus safeguards the deterrence purpose of the exclusionary rule to the fullest extent.

The case at bar is an example of the counterproductive application of the exclusionary rule beyond its purposes. A large amount of heroin was seized from the premi-

ses of an accused shown by a search warrant affidavit to be a seller of heroin. The sequence of events, in outline, was that officers went to execute the warrant, detained the accused briefly, searched his residence, found heroin, arrested him and seized more heroin from his person in a custodial search. The decision of the Michigan Supreme Court is that if the officers had not detained the accused initially at the scene, but had instead run after and caught him a few blocks away once the heroin was found in the house, the resulting arrest and custodial search would have been lawful. The distinction that thus frees an accused proven unequivocally to have committed a serious crime is so elusive that it is no more likely to be understood by the officer in the field than it is to command public respect. Furthermore, the principal basis of the Michigan Court's decision is Dunaway v. New York, which was not

even decided until five years after the seizure at issue and could not possibly have affected the officers' conduct.

III. THE PRINCIPLE THAT COURTS SHOULD AVOID THE TAINT OF ILLEGALLY SEIZED EVIDENCE DOES NOT MANDATE THE EXCLUSION OF EVIDENCE SEIZED REASONABLY AND IN GOOD FAITH. TO THE CONTRARY, IT IS THE EXCLUSION OF EVIDENCE OBTAINED HONESTLY AND REASONABLY THAT TAINTS A COURT.

A second premise that is sometimes said to underlie the exclusionary rule is that courts should avoid the taint of illegally seized evidence. Courts are nondemocratic institutions without enforcement mechanisms. If their orders are to prevail in unpopular as well as popular causes, they must have public respect. Thus Mapp v. Ohio, 367 U.S. 643 (1961), states that the exclusionary rule gives "to the courts, that judicial integrity so necessary in the true administration of justice." Although the Fifth Circuit

in United States v. Williams did not base its decision on analysis of this purpose, it too supports the Williams approach, because when a court admits evidence that an officer has obtained through good faith conduct reasonably undertaken, the court is not by any stretch of the imagination "tainted" thereby.

It is submitted, furthermore, that to the extent there is validity to this principle, it is the exclusion of honestly and reasonably seized evidence, not its reception, that actually taints a court.

A. Public Impression of Criminal Law as a Mass of Technicalities.

The first way in which exclusion in this instance taints the courts is by creating a public impression that the criminal law is a mass of dysfunctional technicalities. This danger was articulated by Justice Cardozo in the case of Snyder v. Massachusetts, 291 U.S. 97, 122 (1934), as follows:

> "There is danger that the criminal law will be brought into contempt--that discredit will even touch the great immunities assured by the Fourteenth Amendment--if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free."

Although the error in Snyder was exclusion of the defendant from proceedings and an improper remark of the trial judge, rather than an illegal seizure, the reasoning applies equally to the instant situation. A non-technican is likely to see little distinction in the difference, if indeed any, between the (lawfully seized) heroin in Summers' house and the (unlawfully seized) heroin on his person.

B. Haphazard Results on Guilt or Innocence.

Secondly, exclusion of evidence reasonably and honestly seized taints the criminal justice system by causing haphazard adjudication of guilt and innocence.

Inconsistent results are sometimes unavoidable under the Constitution, but they should not be encouraged when unnecessary. An incident that occurred in Harris County (Houston), Texas, several years ago illustrates the danger that can result. The District Attorney of Harris County presented seventy-three drug possession cases, some of which were appropriate for no-bills because of seizures that would require suppression and some of which were appropriate for true bills because of searches deemed valid. The grand jury, however, no-billed all cases in both groups, in part because it was apparently unable to rationalize differential treatment of the suspects on the basis of distinctions in the police conduct involved.* The haphazard adjudication that this grand jury impliedly condemned would not be removed entirely by adoption of the Williams approach, but it

would be lessened.

The instant case is an example. The Williams rule is needed here to prevent the inconsistency of acquittal of this accused and conviction of a hypothetical "Summers" who engaged in exactly the same conduct, but who was caught a few blocks away by police who first found heroin in his house rather than detaining him briefly.

D. Demoralizing Effect on the Honest Police Officer.

Third, exclusion of evidence reasonably and honestly seized taints the courts by demoralizing the conscientious police officer, making him less likely, not more likely, to understand and follow fourth amendment decisions. Despite dictum in Dunaway v. New York, supra, to the effect that a "single, familiar standard" of

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* Interview with James Larkin, Assistant District Attorney of Harris County, Texas, in Houston, Nov. 24, 1980.

probable cause guides police officers, that standard immediately dissolves into ambiguity in a concrete factual situation. The variety of probable cause judgments is infinite. It is overlaid by a bewildering array of doctrines such as plain view, stop and frisk, inventory, exigent circumstances, consent, and reasonable investigation. Procedural considerations such as standing and burden of proof likewise influence a variety of causes. An officer rapidly learns that the treatment of these doctrines varies even within the same courthouse from trial judge to trial judge in unpredictable ways. The officer will see a seemingly reasonable search struck down in one case and a borderline one upheld in another. As one prominent Texas criminal defense lawyer has put it,

> "In determining the balance, guidelines have been spelled out by the Supreme Court. A great deal of dif-

> ficulty arises in applying the many guidelines to a particular set of facts. . . . Some magistrates, judges or justices believe the exclusionary rule should be abolished, while other judges believe that the exclusionary rule should not apply where the officer acts in good faith (good faith v. bad faith). Because of the differences of opinion of the judges and justices as to what is reasonable, the decisions dealing with search and seizure appear to be in a constant state of change."

Rawitscher & Carnahan, Search and Seizure and Suppression Procedures, in ADVANCED CRIMINAL LAW COURSE O-1 (D. Crump & State Bar of Texas ed. 1979). If the decisions induce this reaction in a criminal law scholar, they must resemble a roulette wheel to the officer who risks his life in a good faith, reasonable effort to ferret out crime, only to be told that his action was "illegal" and must be deterred by suppression. Research confirms what common sense suggests: police misconduct is most common in situations in which police

officers perceive that they are unlikely to obtain justice in the court system.* Thus, confronted with this maze, an officer is likely to revert to a practice of acting first and asking questions later, particularly if he knows that there will be no recognition of his good faith or reasonableness.

In the instant case, before Dunaway v. New York, it is likely that virtually all police officers would have acted as these officers did. "Protecting the scene" is instinctive. The danger is obvious that someone may be removing evidence when he is observed departing just as police arrive

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* Cf. N. JOHNSON, L. SAVITZ and M. WOLFGANG, THE SOCIOLOGY OF PUNISHMENT AND CORRECTION 11 (1962) (reporting study concluding that "absence of effective legal means" to accomplish lawful ends or safeguard their dignity induces police officers to engage in illegal conduct).

from a scene at which a magistrate has adjudicated probable cause to believe criminal activity is ongoing. Furthermore, having the premises owner present during a search is good police work. The owner may be able, for instance, to supply a key to a door that would otherwise need to be destroyed. These officers are now impliedly told, however, that such conduct was "wilful" or "at the very least, negligent," to use the words of Michigan v. Tucker. This message can only engender disrespect for the courts in those who strive to enforce the law.

D. Appearance of Shifting and Inconsistent Appellate Decision-Making.

Fourth, the present administration of the exclusionary rule places appellate courts in ostensibly shifting and inconsistent doctrinal positions. This Court, for example, has withheld suppression when the illegality has been attenuated by inter-

vening events, the defendant has lacked standing, the challenge has arisen in a habeas corpus action, use of the evidence was before the grand jury, use was for impeachment, or the resulting arrest was used to increase the sentence in another case.* On occasion, doctrinal justification fails to prevent the appearance of a zig-zag course.** These difficulties are

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* United States v. Ceccolini, 435 U.S. 368 (1978); Stone v. Powell, 428 U.S. 465 (1976); United States v. Peltier, 422 U.S. 531 (1975); Michigan v. Tucker, 417 U.S. 433 (1974); United States v. Calandra, 414 U.S. 338 (1974); United States v. Tucker, 404 U.S. 433 (1972); Harris v. New York, 401 U.S. 222 (1971).

** Decisions on searches of automobiles taken to other locations are an example. Compare Carroll v. United States, 267 U.S. 132 (1925); Husty v. United States, 282 U.S. 694 (1931); Preston v. United States, 376 U.S. 364 (1964); and Chambers v. Maroney, 399 U.S. 42 (1970) with Coolidge v. New Hampshire, 403 U.S. 443 (1971); Texas v. White, 423 U.S. 67 (1975) and Arkansas v. Sanders, 442 U.S. 753 (1979). Cf. United States v. Rabinowitz, 339 U.S. 56 (1960) (overruling prior authority on search-incident scope); Chimel v. California, 395 U.S. 752 (1969) (overruling Rabinowitz).

the natural result of practical efforts with conflicting policy, but they create a nagging suspicion that interpretive principles cannot be reconciled with a reasonable view of the fourth amendment.

In this case, a narrow margin of votes separates the Michigan Court majority from the dissent. Several doctrines (e.g., attenuation of taint or prevention of evidence destruction) might reasonably be used to justify the seizure. The Michigan dissenters' reasoning could also be so used. But the real reason the evidence should not be suppressed is that in this individual case, regardless of shifting doctrine, the officers acted reasonably and honestly. Forthright recognition of a reasonable, good-faith mistake exception would go far to remove the appearance of ad hoc decision making.

E. Effect on the Accused: Irrelevance of Guilt or Innocence.

Fifth, the exclusionary rule sometimes taints the criminal justice system by inducing the accused to believe that his guilt or innocence is not important. One popular author has written that "innocence becomes less relevant" as the criminal justice system progresses. F. LEE BAILEY, THE DEFENSE NEVER RESTS 1 (1968). Disparate treatment creates cynicism in an accused. It has been identified by prison wardens in some states as a greater cause for prison unrest than food, overcrowding or conditions of incarceration. COUNCIL ON STATE GOVERNMENTS, DEFINITE SENTENCING: AN EXAMINATION OF PROPOSALS IN FOUR STATES 10 (1976). While this finding was stated in the context of sentencing disparity, the same kind of prisoner cynicism is likely to be generated when disparity is

caused by the exclusionary rule.

F. Untruthful Fact Presentation to Jurors by Officers of the Court.

Finally, the exclusion of reasonably and honestly seized evidence taints the criminal justice system by presenting an untruthful impression to the trier of fact. A conscientious defense lawyer is likely to argue to a jury that the government has not presented sufficient evidence in a trial from which evidence has been suppressed. He is likely to follow with criticism of the government for prosecuting a case without the type of evidence that is "missing." The prosecution is prevented from asserting the existence of the evidence or explaining its suppression.*

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* The "open door" or reply doctrine would allow prosecution response if defense counsel referred by name to the specific item suppressed. But through the exercise of minimal skill, counsel can make a general enough reference to prevent response and still get the point across.

If the seizure was flagrantly improper, suppression may be defensible; however, a juror is likely to feel that he has been unfairly tricked when he learns that the truth has thus been hidden from him by officers of the court notwithstanding a reasonable, good-faith search. Similarly, it is understandable that many attorneys avoid the criminal defense practice because they do not wish to be the tools of such deception.

In the context of the instant case, one need only imagine the accused on trial for possession of the (lawfully seized) heroin found in his house. His defender would argue that nothing connected the accused physically with any contraband. Jurors might well acquit the accused, only to find that the (unlawfully seized) heroin in his pocket was concealed from them by an officer of the court with the court's

own assistance. Such a procedure can only taint both courts and attorneys in the minds of jurors.

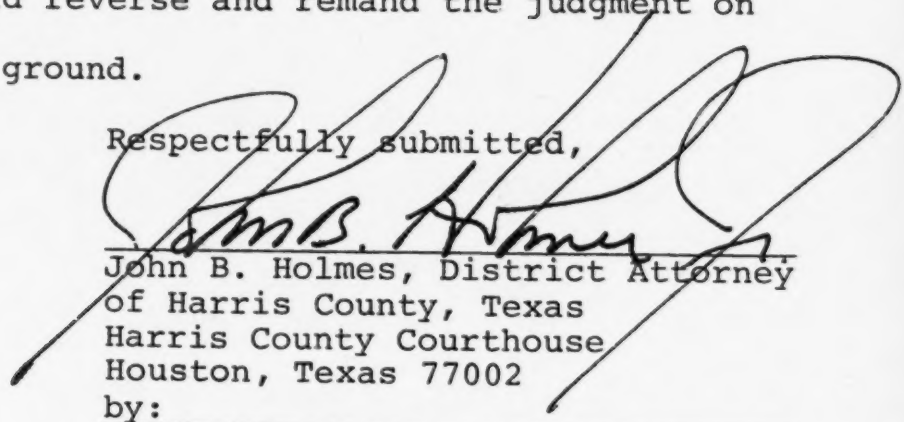
CONCLUSION

For all of these reasons, it is submitted that neither the protection of courts from taint nor the deterrance of illegal police conduct is advanced by the exclusion of evidence seized reasonably and in good faith.

The conduct of the seizure in this case should be adjudicated lawful, and the judgment of the Michigan Supreme Court should be reversed on this ground. In the event that this Court should, however, adjudicate that the seizure was not lawful, the Court should adopt the reasonable, good faith exception from suppression recognized by the Fifth Circuit, and

should reverse and remand the judgment on that ground.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, David Crump, hereby certify that I have accomplished service of this brief and motion prior to filing by depositing in a United States post office, postage first class prepaid, three copies each to the following, in accordance with Rule 28.3 of the Rules of this Court, on _____, 1980:

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